(25)

IN THE

Supreme Court of the United States

October Term, 1942.

No. 489

AREFF SAMARA,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

PREW SAVOY,
Attorney for Petitioner,
The Munsey Building,
Washington, D. C.

KENNETH CARROAD,
Of Counsel.

LOUIS APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

CITATIONS.

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM—1942.

AREFF SAMARA, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, *Defendant-Appellee.*	No. .....

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The plaintiff, Areff Samara, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on July 24th, 1942 (R. 45), affirming on different grounds the judgment of the District Court for the Southern District of New York, 39 F. Supp. 880, 1941 P-H. Par. 62,839. Petition for rehearing was filed with the Circuit Court and denied on July 24, 1942.

Summary Statement of the Matter Involved.

On June 30, 1937, plaintiff filed with the office of the Collector of Internal Revenue, Third District of New York, a claim for refund of compensating taxes paid under Section 15 of the Agricultural Adjustment Act of

1933. (The claim for refund filed herein is set forth in full in the Record at pp. 7-21).

On or about November 26, 1938 and January 28, 1939, the Commissioner of Internal Revenue sent letters to plaintiff requesting additional evidence not already contained in the claim for refund (R. 22-24). Plaintiff did not comply with this request and subsequently received a letter from the Commissioner dated March 15, 1939, rejecting his claim for refund in full (R. 25).

On March 8, 1941, plaintiff instituted suit in the United States District Court, Southern District of New York, for refund of the compensating taxes paid as aforesaid (R. 1-4). Thereafter, defendant moved to dismiss the complaint on the ground that the Court lacked jurisdiction because the claim for refund was insufficient (R. 5). The District Court granted the motion to dismiss and judgment was entered thereon dated July 16, 1941 (R. 28).

Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A. Section 347. The judgment sought to be reviewed is that of the United States Circuit Court of Appeals for the Second Circuit entered on July 24, 1942 (R. 45), affirming on different grounds the decision of the District Court for the Southern District of New York (R. 35-37) 39 F. Supp. 880, 1941 P.-H. Par. 62,839.

Question Presented.

After rejection by the Commissioner of a claim for refund which was filed pursuant to Title VII of the Revenue Act of 1936, is claimant limited in court to the evidence presented to the Commissioner with the claim for refund or may he introduce additional evidence?

Reasons Relied Upon for the Allowance of the Writ.

I.

The Court below decided that in such suit claimant is limited to the evidence presented to the Commissioner with the claim for refund and may not introduce additional evidence. This decision is in direct conflict with the recent decision of the Court of Appeals for the Third Circuit in *Bethlehem Baking Co.* v. *United States,* 1942 P.-H. Par. 62,861 (C. C. A. 3, June 26, 1942) affirming 40 F. Supp. 936, 1941 P.-H. Par. 62,912 (D. C. Pa., 1941) and the recent decision rendered in *Bullock's Inc.* v. *United States,* 43 F. Supp. 861, 1942 P.-H. Par. 62,523 (D. C. Calif., Jan. 26, 1942), appeal dismissed by the Ninth Circuit Court of Appeals, 1942 P.-H. Par. 62,713 (May 4, 1942). It is also in direct conflict with the decisions in *B. Ney & Sons* v. *U. S. A.,* 33 F. Supp. 554, 25 A. F. T. R. 476, 1940 P.-H Par. 62,688 (D. C. for Western District of Va., May 27, 1940), *Hutzler Bros. Co.* v. *U. S.,* 33 F. Supp. 801, 25 A. F. T. R. 516, 1940 P-H Par. 62,765 (D. C. Md., July 2, 1940), No. App. (G) 1940 P-H Par. 61,058) and *London Weatherproofs Inc.* v. *U. S.,* 40 F. Supp. 977, 1941 P.-H. Par. 62,937 (D. C. for Eastern District of N. Y., September 23, 1941). Plaintiff therefore believes the holding of the Court below to be clearly wrong; that the correct rule is as decided in the five aforecited cases—in a suit on a claim for refund filed pursuant to Title VII of the Revenue Act of 1936 and rejected by the Commissioner of Internal Revenue, claimant should be permitted to introduce evidence additional to that presented to the Commissioner with the claim for refund.

II.

The rule for which we contend, is the established rule in respect to claims for refund generally under existing revenue laws.

In *Fidelity & Columbia Trust Co.* v. *Lucas, Collector of Internal Revenue,* 7 F. (2d) 146 (D. C. for Western District of Ky. July 9, 1925) 5 A. F. T. R. 5563, 1925 P.-H. Par. 12,181-A-1, the court in its opinion stated that:

> "* * * in suits to recover internal revenue taxes erroneously or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, jurisdiction to finally determine such matters is conferred upon the Judicial Dept., provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
>
> "In view of these statutory provisions [Section 3226 of the Revised Statutes, among others] and the authorities referred to, this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case *de novo, without in any way being limited to the evidence heard by the Commissioner,* and unprejudiced by any action he may have taken in the matter * * *."

In *Paul Jones & Co.* v. *Lucas, Collector of Internal Revenue,* 33 F. (2d) 907 (D. C. for the Western District of Kentucky, Aug. 1, 1929), 15 A. F. T. R. 681, affirmed *per curiam* in 64 F. (2d) 1016, 1018 (C. C. A. 6, Feb. 16, 1933), 12 A. F. T. R. 484, the principle established by the

Fidelity & Columbia Trust Co. case was reiterated and approved. The court, in its opinion, stated:

> "The evident purpose of Section 3226, Revised Statutes, is to afford the Commissioner of Internal Revenue an opportunity to correct any errors made in the assessment or collection of taxes before the taxpayer and the Government, or its representative, are put to the expense and trouble of litigation * * * the requirement of Section 3226, that a claim for refund must be filed before suit can be instituted, necessarily implies that the claim for refund must be sufficiently specific to enable the Commissioner to know and consider the ground or grounds upon which a refund is sought * * *. The provision contained in Article 1304 of Treasury Regulations 69, *supra,* to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question * * *.
>
> *Fairly construed, the language of the regulation just quoted does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the *taxpayer entirely free, if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in Court, new and additional evidence in support of the facts or reasons relied upon to establish the illegality of the tax.* This construction of the statute and of the regulations is not out of harmony with the rule laid down by this Court in the case of *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 Fed. (2d)

146, and cited with approval by the Supreme Court of the United States, in the case of *Wickwire* v. *Reinecke*, 275 U. S. 101, 49 S. Ct. 337 * * *.

Therefore, construing Section 3226 of the Statutes in light of the rule laid down in the *Fidelity & Columbia Trust Co.* case, *supra*, I conclude that the taxpayer who brings suit after refund has been denied may rely for recovery only on the grounds presented to the Commissioner but that *in support of the grounds relied upon, he is not confined to the evidence adduced before the Commissioner, but he may offer entirely new and additional evidence* * * *."

The Paul Jones & Co. case was quoted with approval in *Biermann* v. *Shea*, 28 F. Supp. 213, 23 A. F. T. R. 575, 1939 P.-H. Par. 5.514 (D. C. N. Y., June 16, 1939), no appeal taken by the Government, 1939 P.-H. Par. 4.69.

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5, June 8, 1932), 11 A. F. T. R. 484, 1932 P.-H. Par. 1369, the same doctrine was approved:

"The United States have consented that illegally exacted taxes may be sued for in Court only after a claim for refund shall have been truly made to the Commissioner of Internal Revenue under regulations made by him. 26 U. S. C. A. Sec. 156; *Kings County Savings Institution* v. *Blair*, 116 U. S. 200, 206. The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath'. The purpose is to enable the claimed errors to be corrected by the Commissioner and suits to be minimized, and if disagreement persists to limit the litigation to the matters which have been so re-examined and in reference to which

the tax officers are fully prepared to defend the issue. They may decline to waive and insist on a proper claim for refund as a prerequisite to suit. *Tucker* v. *Alexander, Collector, supra; U. S.* v. *Felt & Tarrant Co.*, 283 U. S. 269. *This does not mean that the claim for refund must have contained all the evidence or argument that is offered in the suit,* but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds, so that they may be fully investigated * * *."

III.

The rule established in respect to claims for refund generally, under existing revenue laws, must have been intended to be applied in suits on rejected claims for refund under Title VII of the Revenue Act of 1936.

In *U. S.* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. Ed. 859, 13 A. F. T. R. 866, XIII-1 C. B. 393, 1934 P.-H. Par. 790, this Court said:

> "When Section 424 of the 1928 Act was enacted the Internal Revenue Laws contained many related provisions constituting what this Court has termed a comprehensive 'system of corrective justice' in respect of the assessment and collection of erroneous or illegal taxes. * * *
>
> *As a general rule,* where the legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, *new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system to be carried into effect conformably to it, excepting as a different purpose*

is plainly shown. (*U. S.* v. *Barnes,* 222 U. S. 513, 520 and cases cited; *U. S.* v. *Sweet,* 245 U. S. 563, 572; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 384.)

That rule is applicable here. The existing system developed through long years of experience comprehends the entire subject, including all claims for refund. Section 424 is a new enactment and relates to a designated class of such claims, concededly within the scope of the existing system. Obviously the section is intended to make some change as respects the particular class and must be given effect accordingly, but to determine what change is intended it must be examined in light of the existing system."

Title VII of the Revenue Act of 1936 is like Section 424 of the 1928 Act, which is discussed above by the U. S. Supreme Court. Similarly, Title VII was intended to fit into the existing system established in respect to claims for refund generally and was intended to be carried into effect conformably to it, excepting as a different purpose is plainly shown.

Part of the existing system established in respect to claims for refund generally is that in a suit on a rejected claim for refund the claimant may introduce new evidence in addition to that which was submitted to the Commissioner originally along with the claim for refund. This rule must have been intended to operate, as part of the existing system established in respect to claims for refund generally, in respect to claims for refund under Title VII of the Revenue Act of 1936—excepting as a different purpose is plainly shown. Apart from a substantive change (similar to the one made in Section 424 under discussion by this Court in the Jefferson case), Title VII of the Revenue Act of 1936 discloses

no purpose to depart from the existing system—in fact it was expressly intended to be carried into effect conformably to it. (The Report of the Senate Finance Committee concerning the Revenue Bill of 1936, 74th Congress, 2d Session, Calendar No. 2266, Report No. 2156, states that: "However, the procedure in the handling of these claims has been modified so as to diminish insofar as possible the administrative burden involved in passing on them. The greater number of claims which may be filed relate to claims for compensating taxes and floor stocks taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. *The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund under existing law. The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he will then have recourse to the district court or the Court of Claims.*") Therefore, in suits on rejected claims for refund under Title VII of the Revenue Act of 1936, evidence should be admissible in addition to that presented to the Commissioner.

IV.

In all the cases (prior to the present decision) in which this problem arose, the Courts held, in accordance with the rule established under the existing system in respect to claims for refund generally, that evidence in addition to that submitted to the Commissioner along with claims for refund should be allowed to be introduced in suits on rejected claims for refund under Title VII of the Revenue Act of 1936. *Bethlehem Baking Co. v. U. S.*, 1942 P.-H. Par. 62,861 (C. C. A. 3, June 26,

1942) affirming 40 F. Supp. 936, 1941 P.-H 62,912 (D. C. Pa. 1941); *Bullock's, Inc.* v. *U. S.*, 43 F. Supp. 861, 1942 P.-H. Par. 62,523 (D. C. Calif., January 26, 1942), appeal dismissed by the Ninth Circuit Court of Appeals, 1942 P.-H. Par. 62,713 (May 4, 1942); *B. Ney & Sons* v. *U. S.*, 33 F. Supp. 554, 24 A. F. T. R. 476, 1940 P.-H. Par. 62,688 (D. C. for Western District of Va., May 27, 1940); *Hutzler Bros Co.* v. *U. S.*, 33 F. Supp. 801, 25 A. F. T. R. 516, 1940 P.-H. Par. 62,765 (D. C. Maryland, July 2, 1940), No App. (G) 1940 P.-H. Par. 61,058; and *London Weatherproofs, Inc.* v. *U. S.*, 40 F. Supp. 977, 1941 P.-H. Par. 62,937 (D. C. for Eastern District of N. Y., September 23, 1941). The authorities would have been unanimous if not for the decision in the present case.

V.

The decision of the Circuit Court in the present case violates the pattern of procedure set forth in Title VII of the Revenue Act of 1936. Section 903 of Title VII, which provides that "All evidence relied upon" in support of a claim for refund "shall be clearly set forth under oath" and on which the Circuit Court based its conclusion that additional evidence might not be presented in the trial court, applies to all claims for refund under Title VII, to claims for refund of processing taxes as well as to claims for refund of floor stocks taxes, compensating taxes and custom processing taxes paid under the Agricultural Adjustment Act. Yet, it is made entirely clear by Section 906 (g) of Title VII that Section 903 was not intended to have the effect of precluding the claimant, on a review of the Commissioner's disallowance of his claim for a refund of processing taxes, from presenting evidence not presented to the Commissioner. Section 906 (g) makes it clear beyond

peradventure that he may do so, for it is there provided that even after the decision of the Board of Review, which is the exclusive tribunal for review of the Commissioner's action on claims for refund of processing taxes,—even after its decision and while an appeal is pending in a Circuit Court of Appeals, the Circuit Court may order a reopening of the hearing before the Board of Review in order that the claimant may present additional evidence. The only restriction upon this power is that the Court shall be satisfied that the additional evidence is "material" and that there were "reasonable grounds for failure to adduce such evidence" at the hearing before the Board. There is absolutely no qualification that such evidence must have been adduced initially before the Commissioner.*

Further observations on the Circuit Court's rationale appear to us appropriate. The Circuit Court states that "new grounds or facts in support of the claim should be submitted to the Commissioner by a timely amendment to the claim for refund". We have no quarrel with this as an abstract proposition. But we do not in this suit rely on new "grounds" or new "facts". We only bespeak

---

*Section 906 (g) provides:

"* * * If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. * * *"

for petitioner an opportunity to satisfy the trial court of the truth of the facts set forth in the sworn claim for refund.

The Circuit Court states that to allow the claimant to present additional evidence would defeat the administrative adjustment of claims contemplated by Title VII. That fear we submit is groundless as Section 914 of Title VII gives the Commissioner ample authority to establish the facts required to be established under that title and affords him ample power to safeguard every legitimate interest of the Government.*

Section 902 of Title VII provides that no refund shall be made unless the claimant satisfies the Commissioner *or*

---

*Section 914 provides:

"In connection with the establishment of the facts required to be established under this title, the Commissioner of Internal Revenue is hereby authorized, by any officer or employee of the Treasury Department and of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda which are relevant and material in connection with any claim made pursuant to this title, to require the attendance of the claimant or of any officer or employee of the claimant, or the attendance of any other person having knowledge in the premises, and to take, or cause to be taken, his testimony with reference to any such matter, with power to administer oaths to such person or persons. It shall be lawful for the Commissioner, or any person designated by him, to summon witnesses to appear before the Commissioner, or before any person designated by him, at a time and place named in the summons, and to produce such books, papers, correspondence, memoranda, or other records as the Commissioner may deem relevant or material, and to give testimony or answer interrogatories, under oath, relating to any claim made pursuant to this title. * * *".

the trial court (or the Board of Review in cases involving processing taxes) that he bore the burden of the tax and did not shift it. If the Circuit Court's decision is allowed to stand, the opportunity given the claimant by the statute, in the alternative, to satisfy the trial court will become a mirage to thousands of claimants whose claims for refund have been disallowed by the Commissioner—and this without forewarning. As we have pointed out, all previous decisions have allowed the claimant to present additional evidence to the trial court.

Wherefore, it is respectfully submitted that the petition should be granted.

PREW SAVOY,
Attorney for Petitioner,
The Munsey Building,
Washington, D. C.

KENNETH CARROAD,
Of Counsel.